

1 THE HONORABLE RICHARD A. JONES

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7 UNITED STATES DISTRICT COURT  
8 FOR THE WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 JOHN KWESELE,

11 Plaintiff,

12 v.

13 KING COUNTY, *et al.*,

14 Defendants.

No. 2:17-cv-1426-RAJ

ORDER

15 This matter comes before the Court on Plaintiff's Motion for a New Trial or,  
16 Alternatively, to Alter or Amend Judgment. Dkt. # 48. Defendants oppose, and  
17 Plaintiff has filed a Reply. Dkt. ## 49, 50. For the reasons stated below, the Court  
18 **DENIES** Plaintiff's Motion.

19 **I. BACKGROUND**

20 On January 18, 2019, this Court granted Defendants' Motion for Summary  
21 Judgment against Plaintiff on his Section 1981 race discrimination and retaliation  
22 claims, and Section 1983 claims. Dkt. # 43. The Court outlined the relevant facts of  
23 this case in its prior Order and will not reiterate those facts here. *Id.* On February 14,  
24 2019, Plaintiff filed the instant Motion, arguing that the Court should grant Plaintiff a  
25 new trial or amend its prior judgment. Dkt. # 48.  
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## II. LEGAL STANDARD

The Court construes Plaintiff's Motion as one arising under Federal Rule of Civil Procedure 59(e). Rule 59(e) allows a plaintiff to file a motion to alter or amend a judgment "no later than 28 days after the entry of judgment." Fed. R. Civ. Proc. 59(e). Although a district court may extend filing times for good cause, Rule 6(b)(2) expressly prohibits the court from extending time to act under Rule 59(e). Fed. R. Civ. Proc. 6(b)(2). A Rule 59(e) motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)) (emphasis in original).

## III. DISCUSSION

Plaintiff argues that this Court's decision dismissing his Section 1981 discrimination and retaliation claim should be amended due to (1) the Court committing legal and factual error; (2) there was an intervening change in the law with respect to the retaliation claim; and (3) for public policy reasons. Dkt. # 48. For the reasons that follow, the Court concludes that it did not err in dismissing Plaintiff's Section 1981 discrimination and retaliation claims, and will not amend its ruling on public policy grounds.

### A. The Court Did Not Err in Dismissing Plaintiff's Discrimination Claim

The Court agrees with Plaintiff that Section 1981 imposes liability against employers for hostile work environments. Dkt. # 48 at 4. And it is true that the Court found the evidence of racist behavior by Plaintiff's colleagues "may have supported a hostile work environment claim," had Plaintiff actually pled such a claim. Dkt. # 43 at 17 n.7. But as the Court already explained, "Plaintiff is not making a hostile work environment claim in this lawsuit; he is alleging claims of

1 racial discrimination and retaliation against him by King County and his direct  
2 supervisors through his termination and probation extensions.” *Id.* at 19. Plaintiff  
3 provides no authority that the need to plead a hostile work environment claim is  
4 obviated by pleading other Section 1981 claims for discrimination and retaliation.  
5 Hostile work environment claims are distinct claims, with distinct elements, and  
6 must be analyzed separately from discrimination and retaliation claims. *See, e.g.,*  
7 *Atkins v. Commercial Office Interiors*, C06-1594-JCC, 2007 WL 4561091, at \*3  
8 (W.D. Wash. Dec. 20, 2007) (finding that discrimination and hostile work  
9 environment claims are “distinct Title VII claims” with differing elements, and  
10 considering them separately).

11 Plaintiff lambasts the Court for providing a “veritable blueprint” for  
12 employers to “passively tolerate discrimination,” but ignores his inexplicable failure  
13 to ever properly assert a hostile work environment claim. Dkt. # 48 at 14. Plaintiff  
14 has still not argued that he is, or was ever, asserting a Section 1981 hostile work  
15 environment claims against Defendants. Plaintiff has not filed, for instance, a Rule  
16 15(b)(2) motion or made any other attempt to amend his pleadings to add a hostile  
17 work environment claim. As such, this claim has never been properly before the  
18 Court, and this status continues to this day.

19 Absent an active claim for hostile work environment, Plaintiff’s attempt to  
20 shoehorn in this unpled claim to his discrimination claim falls short. Plaintiff’s  
21 Motion again fails to show that this environment was the product of any action or  
22 discriminatory intent on the part of the relevant decision-makers. The Court has  
23 already addressed the other alleged acts of discrimination by other King County  
24 employees Doug Moore, Annette James, Kevin Winter, and Glenn Brockett, and  
25 found that Plaintiff failed to connect these actions to Plaintiff’s termination by the  
26 relevant decision-makers. Dkt. # 43 at 17-18. Plaintiff provides little reason for the  
27 Court to deviate from its conclusion.

1           Importantly, Plaintiff's failure to articulate a causal link between his direct  
2 supervisor's actions and the alleged hostile environment distinguish this case from the  
3 two out-of-circuit authorities Plaintiff cites in his Motion. Dkt. # 48 at 15-16. In its  
4 previous Order, the Court determined based on the record that it was King County's  
5 ignorance and apathy that contributed to this environment, not the actions of Plaintiff's  
6 supervisors. Dkt. # 43 at 18-21. The Court's view of the record on this point remains  
7 the same. Plaintiff's charge in his Motion that his supervisors "were fabricating  
8 evidence against him in order to get him fired" is still not supported by citations to  
9 admissible evidence in the record. Dkt. # 48 at 8. The only evidence Plaintiff cites  
10 that is connected to Plaintiff's actual supervisors fails to indicate any discriminatory  
11 animus on the part of relevant decision-makers. For instance, alleged statements by  
12 Michael Avery that suggested Sound Transit disapproved of Plaintiff do not show any  
13 discriminatory intent on the part of the relevant decision-makers because, as the Court  
14 already determined, Sound Transit has no managerial authority over Plaintiff. Dkt. #  
15 43 at 7.<sup>1</sup> Plaintiff does not challenge this finding, and fails to point to any evidence  
16 that Sound Transit played any role in taking any adverse action against him.<sup>2</sup>

17           Plaintiff's Motion also largely ignores the Court's determinations that  
18 Plaintiff's prima facie discrimination claim failed on multiple prongs. First, Plaintiff  
19 has failed to meaningfully address the Court's finding that Plaintiff failed to show  
20 that similarly situated individuals outside his protected class were treated more  
21 favorably. Dkt # 43 at 14. Plaintiff still does not provide evidence that other fellow  
22 RSITs received different discipline, and does not address the Court's point that the  
23 ROW incident is of a different kind and severity entirely. Dkt. # 43 at 14-15.  
24 Second, Plaintiff fails to effectively counter that Plaintiff's multiple performance

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26 <sup>1</sup> As the Court noted, Defendant Michael Avery disputes making these statements. Dkt. # 47 at 7; Dkt. # 21,  
Ex. D, at 35:4-18.

27 <sup>2</sup> Plaintiff also admits that the challenged and off-hand comments by Michael Avery "did not create a hostile  
work environment." Dkt. # 50 at 5.  
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1 lapses still indicate that he was not meeting his employer's legitimate expectations.  
2 Dkt. # 43 at 12-14. The Court was particularly concerned with the Right-of-Way  
3 ("ROW") incident, where Plaintiff's admitted failure to properly follow the ROW  
4 protocol put surveyors in serious danger and could have led to fatalities. Dkt. # 43 at  
5 12-13. Plaintiff's actions during this incident, which included permitting surveyors  
6 to remain in the ROW for the trail tracks for an extended period of time and  
7 misstating their location and intentions to his supervisors, appeared to serve as the  
8 main catalyst for Plaintiff's termination. *Id.* at 7-8, 12-13. Even if this Court  
9 ignored the other performance lapses, this incident was by itself sufficient reason for  
10 termination. Dkt. # 43 at 14, 16-17, 22-23.

11 Plaintiff argues that some of the alleged performance issues, such as arriving  
12 late or not contacting colleagues when he reported for his shift, were inaccurate and  
13 reported by some of the colleagues who harbored racial animus towards him. Dkt. #  
14 48 at 5. Even if the Court accepts this as true, the result would not change, as there  
15 are a number of other well-documented performance lapses that show both that  
16 Plaintiff was not meeting his employer's legitimate expectations and that his  
17 termination was not pretextual. For instance, Plaintiff gives no indication that any  
18 allegedly racist colleague was connected with the ROW incident. While termination  
19 for the ROW incident does not excuse the offensive behavior of Plaintiff's  
20 colleagues, it also appears from the current record to be disconnected with other  
21 incidents of racial animus. The record still indicates that termination decision was  
22 primarily based not on the reports from the allegedly offending employees, but by  
23 the ROW incident and reports from other employees, such as Chiefs Alfred Azen,  
24 David Vestal, Gabriel Rukeyser, Keith Sherry, and James Dunn, Superintendent  
25 Tom Jones, and Rail Supervisor Justin Swanson. *See, e.g.*, Dkt. # 24 at Exs. A, D,  
26 E, G, J, L.

27 Similarly, Plaintiff's belated analysis of a "Cat's Paw" theory under *Staub* is

1 unavailing at this stage. Dkt. # 48 at 6-7. First, as the Court previously held, Plaintiff  
2 inadequately briefed this issue on summary judgment with only two sentences of  
3 analysis. Dkt. # 43 at 18. Second, even if Plaintiff had properly asserted this theory,  
4 he fails to argue for its proper application to these facts. Plaintiff fails to argue or  
5 point to evidence showing that any of the offending employees had “singular  
6 influence” over the relevant decision-makers. *See Staub v. Proctor Hosp.*, 562 U.S.  
7 411, 416 (2011). As Defendants point out, Plaintiff’s evidence does not establish  
8 whether the observations of Moore, Shields, and James formed the basis for Plaintiff’s  
9 termination; instead, the record termination decision was based on reports of  
10 Plaintiff’s performance from multiple other employees.

11 Finally, Plaintiff also contends that the Court erred in misapplying the  
12 *McDonnell Douglas* framework to Plaintiff’s case, and argues more generally that the  
13 burden-shifting framework should not apply to discrimination cases such as this one.  
14 Dkt. # 48 at 12-14; Dkt. # 50 at 2-3. The Court rejects this argument for two reasons.  
15 First, it is well-settled in this Circuit that the burden-shifting framework of *McDonnell*  
16 *Douglas* is properly applied to discrimination and retaliation claims under Section  
17 1981. *See, e.g., White v. California*, 754 Fed. Appx. 575, 576 (9th Cir. 2019) (“In  
18 evaluating claims of discrimination and retaliation under 42 U.S.C. § 1981, we apply  
19 the burden-shifting framework established in *McDonnell Douglas*”). Second, the  
20 Court explicitly did not rely solely on *McDonnell Douglas* in rejecting Plaintiff’s  
21 discrimination claim. The Court also considered Plaintiff’s claim under the alternate  
22 standard set forth in *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003),  
23 *as amended* (Jan. 2, 2004) (citations omitted) (emphasis added). Dkt. # 43 at 19. The  
24 Court found that even outside the *McDonnell Douglas* framework, Plaintiff failed “to  
25 adequately provide citations to the record of discriminatory animus on the part of the  
26 relevant decision-makers at King County.” *Id.* This continues to be true; Plaintiff has  
27 failed to show that a discriminatory reason “more likely than not” motivated his

1 employer to terminate him. *Metoyer v. Chassman*, 504 F.3d 919, 931 (9th Cir. 2007).  
2 The record strongly indicates that Plaintiff's performance failures, notably the ROW  
3 incident, prompted his termination, not his race.

4 B. The Court Did Not Err in Dismissing Plaintiff's Retaliation Claim

5 In addition to the arguments raised above, Plaintiff also argues that the Court  
6 should reverse its dismissal of his retaliation claim because it applied the wrong legal  
7 standard. Dkt. # 48 at 9-11. Plaintiff identifies a recent Ninth Circuit case, that he  
8 contends constitutes an intervening change in law that should change the Court's  
9 analysis. *Nat'l Ass'n of African Am.-Owned Media v. Charter Commc'ns, Inc.*, 915  
10 F.3d 617, 626 (9th Cir. 2019). In this case, the Ninth Circuit was presented with  
11 Section 1981 claims involving racial discrimination in refusing to enter a carriage  
12 contract with plaintiffs. *NAAOM*, 915 F.3d at 619-22. The Ninth Circuit held "[i]f  
13 discriminatory intent plays any role in a defendant's decision not to contract with a  
14 plaintiff, even if it is merely one factor and not the sole cause of the decision, then that  
15 plaintiff has not enjoyed the same right as a white citizen. This, we conclude, is the  
16 most natural reading of §1981." *Id.* at 625.

17 The Court agrees that this decision, which was entered after this Court issued  
18 its ruling, may theoretically constitute an intervening change in law. However, even  
19 if the Court had applied *NAAOM*, it would not change the outcome. As the Court  
20 already noted, Plaintiff provided little evidence, beyond temporal proximity, that his  
21 protected activity "was a factor at all" in the termination decision. Dkt. # 43 at 22.  
22 Indeed, Plaintiff's final complaint occurred after the ROW incident, and Plaintiff has  
23 still failed to show that this complaint was a factor in the final termination decision,  
24 through the statements of his supervisors or otherwise. *Id.* at 22-25. Even if this Court  
25 had applied the "mixed-motive standard" to Plaintiff's retaliation claim, the lack of  
26 any new record citation that Plaintiff's protected activity was a factor in his  
27 termination, or that the proffered reasons for termination were pretextual, would lead

1 to the same result.

2 C. The Court Will Not Amend its Judgment on Public Policy Grounds

3 Finally, the Court declines to amend its judgment for public policy reasons.  
4 Plaintiff contends the Court's decision provides a "veritable blueprint for how an  
5 employer can engage in a systematic course of conduct that either purposefully  
6 advances or passively tolerates discrimination to such a magnitude that its black  
7 employees are unable to enjoy the same benefits as their white counterparts while  
8 being perpetually vulnerable to termination." Dkt. # 48 at 14. The Court disagrees,  
9 and sees counsel's unfounded contention as nothing more than blame shifting  
10 because of his failure to plead the only claim that was clearly supported by his facts.  
11 The "blueprint" for avoiding this result in the future is simple: plaintiffs exposed to a  
12 racially hostile work environment should plead a Section 1981 hostile work  
13 environment claim against their employer. Plaintiff's counsel in this case has failed  
14 to do so. Instead, Plaintiff only alleged claims of discrimination and retaliation  
15 against his employer and direct superiors when the record (1) reflected serious safety  
16 violations by Plaintiff; and (2) contained few indications that the relevant decision-  
17 makers harbored discriminatory or retaliatory animus. These specific claims were  
18 not supported by the record or law, and it was for those reasons that the Court  
19 dismissed them. The Court will not reverse its decision dismissing these claims  
20 solely because of the potential viability of a claim that is not properly before it.

21 **IV. CONCLUSION**

22 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion. Dkt. # 48.

23 Dated this 30th day of April, 2019.

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27 The Honorable Richard A. Jones  
United States District Judge